IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 811 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RABARI BHUPAT DEVAYAT

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 811 of 1995
MR KB ANANDJIWALA for Petitioner No. 1-4
Mr I M Pandya, APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE D.P.BUCH

Date of decision: 05/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

The appellants above named have preferred this appeal under section 374 of the Code of Criminal Procedure, 1973, (for short, 'the Code'), challenging the judgment and conviction order dated 31.7.1995 recorded by the learned Addl.Sessions Judge, Junagadh in Sessions Case No.129/93 convicting the present 5 appellants for various offences including the offences punishable under sections 302, 326, 307 read with section 35, 324, 147, 148 and 149 of IPC. By the said judgment and conviction order, the learned trial Judge had inflicted following punishments on the appellants:

i. Appellant No.1, Bhupat Devayat Rabari was convicted for an offence under section 302 of IPC and was sentenced to suffer R.I. for life. He was also directed to pay fine of Rs.200/-/- and in default of payment of fine, he was directed to suffer R.I. for six months. He was also convicted for an offence punishable under section 307 read with section 34 of IPC but no separate sentence was imposed upon him for the said offence.

ii. Appellant No.2, Raja Lakha Rabari was convicted for offence under section 307 of IPC as well as for offence under section 302 read with section 34 of IPC and for offence punishable under section 302 read with section 34. He was sentenced to suffer R.I. for life. He was also directed to pay fine of Rs.200/-/- and in default of payment of fine, he was required to undergo further R.I. for six months. No separate sentence was imposed upon this appellant for offence under section 307 of IPC.

iii. Appellant No.3, Jika Devayat Rabari was also convicted for offence under section 302 read with section 34 of IPC as well as for offence punishable under section 307 read with section 34 of IPC and similar sentence has been imposed on him also.

iv. Appellant No.4, Jadav Devayat Rabari was also convicted for offence under section 302 read with section 34 of IPC as well as for offence under section 307 read with section 34 of IPC and similar sentence was imposed on him also.

2. The trial court further directed that the

appellants be given benefit of provisions made under section 428 of the said Code and the sentence already undergone be set off against the sentence awarded.

3. The facts of the case of the prosecution as can be gathered from the FIR filed by injured eye witness Bhovan Harjibhai at Exh.38 may be briefly stated as follows:

Injured eye witness Bhovan Harjibhai was dealing with the business of sale and purchase of groundnut in the partnership of deceased Balubhai. Both of them used to purchase groundnut from different districts and used to sell and supply the same to Amar Industries at Junagadh. They used to hire truck of prosecution witness-Naran Rana.

4. The incident took place on 13.5.93 at about 10.30 p.m. According to the said FIR, two days prior to the said incident, the informant and prosecution witness Naranbhai Rana had gone to Savar Kundala Taluka for the purchase of groundnut in truck bearing No.GTK 4260 belonging to the said witness Naranbhai Rana. They purchased groundnut from Savar Kundala and emptied the truck in the premises of Amar Industries at Junagadh on 13.5.1993 which is situated in GIDC estate and which belongs to one Kantibhai Patel. After unloading the truck in the said premises at about 7 p.m. on 13.5.1993, they both were returning to their residence. On the way, near Majevadi gate, the first appellant met them on the road and enquired as to why they were not transporting their goods in his (truck of appellant No.1-Bhupat) truck and why they used to hire truck of other persons. He also told them that if they wanted to hire truck of a stranger, then they should pay an amount of Rs.200/- per trip to him. At that point of time, the informant told him that he was not in a position to pay the said amount to the first appellant. Thereafter the informant, deceased Balu, his brother Naughanbhai Ebhabhai all had gathered together at the place of the informant. Even witness Naranbhai Rana was also present at the said residence. At that point of time, the informant informed the deceased that the first appellant was demanding money and was stopping his vehicle on the way. That at that time, the deceased replied that money could not be paid to the first appellant. That thereafter they decided to meet the first appellant and, therefore, they all went to the residence of the first appellant which is situated outside Majevadi gate at Junagadh. However, the first appellant was not available there. Therefore, they all returned to the house of the informant which is situated

near Randal well at Junagadh. It was around 10.30 p.m. They all were standing right in front of the residence of the informant. At that point of time, the appellants Bhupat Rabari, Raja Rabari, Jika Rabari and Jadav Rabari arrived there. Out of them first appellant-Bhupat Rabari had an iron pipe with him, appellant-Raja Rabari was having a sword with him whereas appellants Jadav Rabari and Jika Rabari possessed iron pipe and stick respectively. On arrival of the said appellants, they enquired as to why they did not use to hire their truck. They also enquired as to why these people had visited the house of the first appellant. On so saying, the first appellant dealt a forceful blow of iron pipe on the head of the deceased. Appellant Raja Rabari dealt a sword blow on the back of the informant. Appellant Jadav had dealt a blow with iron pipe on the head of Naughanbhai and another blow on the back side of the shoulder of the deceased. Driver Naranbhai Rana tried to intervene and at that point of time, Jika Rabari dealt a stick blow on him. Thereafter, these witnesses started shouting at which son of the informant Nilkanth Bhovanbhai and the wife of the informant Sharda and their daughter Varsha and the persons staying in the neighbourhood rushed to the spot. In the meantime, all the four appellants fled away in a rickshaw. Thereafter, the injured witnesses were taken to the Government Hospital in the vehicle of Naranbhai Rana for treatment. There it was noticed that the injuries received by the deceased were serious and the deceased was unconscious. That when the incident took place, the lights were on and the informant could identify the accused persons. Accordingly FIR as lodged by the informant at 12.40 midnight against the appellants.

5. Thereafter it was noticed that the injuries received by the deceased as well as by the informant were serious and, therefore, they were referred to the Civil Hospital at Ahmedabad. Therefore, they were on way to Ahmedabad. In the meantime, the condition of the deceased was found to be serious and, therefore, instead of going to Ahmedabad, they approached the Civil Hospital at Rajkot. There some treatment was given to the injured persons. However, the deceased died and, therefore, offence punishable under section 302 of IPC was also registered against the appellants. The informant was treated at the Civil Hospital at Rajkot and thereafter he was treated in a private hospital also as his condition was also serious.

6. On receiving the aforesaid FIR, investigation was undertaken by P.I. Chudasma. He, drew panchnama of the

scene of the offence and dead body of the deceased was referred for post mortem and postmortem report was collected. During the course of investigation, statements of the witnesses were recorded, panchnamas were drawn for the recovery and discovery of muddamal weapons. Reports of FSL and serologist were collected. The appellants were arrested and they were presented before the concerned learned Magistrate. At the end of the investigation, the Investigating Officer found that a case was made out against the appellants and other two accused persons and, therefore, charge sheet was filed against all the persons by the learned Magistrate, Junagadh. Since the offences punishable under sections 302 and 307 of IPC were exclusively triable by a Court of Sessions, the learned Magistrate committed the case against the appellants to the court of Sessions under section 209 of the said Code. There the case was registered as Sessions case no.129/93. The learned Judge incharge of the case framed charge against the appellants for the aforesaid offence. It was read over and explained to the appellants. They pleaded not guilty and claimed to be tried. Therefore, the learned trial Judge, proceeded to record evidence against the appellants and other two accused persons. At the close of the evidence, the learned trial Judge recorded further statements of all the accused persons under section 313 of the Code. The appellants and other accused persons had pleaded a case of total denial. They contended that they were not present at the time of the commission of the offence and they had not committed any offence. After hearing the argument, the learned trial Judge found the present appellants guilty for the aforesaid offences. However, the learned trial Judge found that original accused No.6 and 7 were not proved to have committed any offence and, therefore, benefit of doubt was extended to them and they were acquitted. Then the learned trial Judge heard the learned Advocates for the parties on the quantum of punishment and thereafter, sentenced the appellants for the aforesaid offence as aforesaid.

6. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred this appeal before this court. Even before this court it has been mainly contended by the learned Advocate for the appellants that the appellants were not present at the scene of the offence. That they have not committed any offence, that the name of the first appellant was not properly described in the FIR and since he was not present, name of the first appellant has been shown as Bhupat Kala whereas the first appellant is Bhupat Devayat Rabari and, therefore, there is a clear

case of mistaken identity and, therefore, the prosecution cannot be treated to have proved that the first appellant was present at the scene of the offence and he committed the offence in question. That on the whole, the judgment and conviction order of the trial court are illegal and erroneous and deserve to be set aside. The appellants have, therefore, prayed that the present appeal be allowed, the judgment and conviction order against the appellants be set aside, the appellants be held not guilty for the aforesaid offences and they may be set at liberty forthwith.

On receiving the appeal, it was admitted but bail was refused.

8. When the appeal came up for final hearing, Mr K B Anandjiwala, learned Advocate appeared on behalf of the appellants whereas on behalf of the State, the appeal was argued by learned APP, Mr I M Pandya, who has supported the judgment of the trial court.

9. In order to prove the guilt against the appellants the prosecution has examined as many as 23 witness as follows:

---

i. PW 1 Exh.14 Dr.Tulsidas Aghara, Rajkot
ii. PW 2 Exh.24 Dr. Sushilkumar Karia, "
iii. PW 3 Exh.26 Dr.Viral vasavada, Rajkot
iv. PW 4 Exh.37 Bhovanbhai Harjibhai, Informant-injured eyewitness
v. PW 5 Exh.39 Naughanbhai Ebhabhai, injured eye witness
vi. PW 6 Exh.40 Nilkanth Bhovanbhai, eye witness, s/o Bhovanbhai
vii. PW 7 Exh.41 Rameshbhai Ramjibhai (hostile)
viii. PW 8 Exh.43 Amrutlal Vrajlal, Panch

ix. PW 9 Exh.45 Ksambhai Hussain (hostile)
x. PW 10Exh.47 Jentilal Dayalal (hostile)
xi. PW 11Exh.49 Arbham Oghad "
xii. PW 12Exh.51 PSI Hansaben Joshi
xiii. PW 13Exh.54 H.C. Merubhai Devani
xiv. PW 14Exh.56 Hasan Mohmad (hostile)
xv. PW 15Exh.58 Lalitkumar Parmanand "
xvi. PW 16Exh.60 Savarsingh Chhagansingh "
xvii . PW 17Exh.65 Nilesh Girdharlal (panch witness Exh.47)
xviii. PW 18Exh.66 Manoj Kishorchand (panch

witness Exh.45)

xix PW 19Exh.67 Sarman Samat (hostile co-panch)
xx. PW 20Exh.68 Naranbhai Rana (hostile)
xxi. PW 21Exh.69 Dr.Nilaben (post mortem)
xxii. PW 22Exh.71 Girdharlal Mohanlal
xxiii. PW 23Exh.72 P.I.Shri Chudasama

The prosecution has also brought on record certain documentary evidence as follows:

i. Injury certificate of deceased Exh.15
ii. X-ray plate of the injuries Exh.16&17
of the deceased
iii. X-ray plate of the injuries of the informant Exh.18&19
iv. -do- Exh.20
v. X-ray plates of injuries of injured eye witness Navghan Ebhabhai Exh.21&22
vi. Injury cert. of injured Naavghan Exh.23
vii. Injury cert. of Dr.Karia Exh.25
viii. Cert.of injury and treatment issued by Dr.Vasavada Exh.26
ix. Inquest panchnama of deceased Exh.29
x. Panchnama for collection of blood of the informant Exh.30
xi. Panchnama regarding clothes of deceased Exh.31
xii. Panchnama regarding seizure of rickshaw Exh.32
xiii. Outward letter issued to the chemical Analyser Exh.33
xiv. C.A. report of FSL Exh.34
xv. Serological report & CA report Exh.35&36
xvi. FIR Exh.38
xvii. Panchnama regarding scene of offence Exh.44
xviii. Panchnama reg. seizure of clothes of informant Exh.46
xix. Panchnama reg.seizure of shirt/clothes of Naran Rana Exh.48
xx. Station diary entry Exh.52
xxi. Station diary entry Exh.53
xxii. -do- Exh.55
xxiii. Arrest panchnama of accused 1 to 6 Exh.57
xxiv. Arrest panchnama of accused No.7 Exh.59
xxv. Injury certificate of Navghan Ebha Exh.74

10. So far as the ocular evidence is concerned, the

prosecution examined Dr.Tulsidas of Rajkot at exh.14, Dr.Karia of Rajkot at Exh.24, Dr.Vasavada of Rajkot at Exh.26 and Dr.Nilaben Vasantji at Exh.69. So far as the death of the deceased is concerned, we find evidence of Dr.Nilaben at exh.69. At the relevant point of time, she was working as Medical Officer in the Civil Hospital, Rajkot. On a requisition made by the Pradyumannagar police station, Rajkot, she had performed the post mortem in respect of the dead body of the deceased. She has clearly deposed before the trial court that she had performed post mortem in respect of the dead body of the deceased. At that point of time, she had noticed following injuries on the person of the deceased:

i. Deep wound near middle right side region of head - cross mark shape
ii. one CLW of 1 cm size over right hand outer side.

It was also noticed by her that so far as the head injury is concerned, clotting of blood was noticed and internal injury was also found - 8 cms size. It was also noticed that there was fracture in respect of skull bone. The witness has recorded her opinion that the deceased died on account of shock sustained by him on account of haemorrhage and on account of the injuries sustained by him. She has also stated that the said injuries were sufficient in the ordinary course of nature to cause death of the deceased. She has further deposed that the injuries could be caused by muddamal iron pipe.

11. Looking to the said evidence, it is apparent that the deceased died on account of the said injuries sustained by him. Even there is evidence of the informant that the appellants had dealt blows with weapons on the head of the deceased and, therefore, he sustained injuries. Therefore, he was carried to different hospitals and ultimately the deceased died on account of the said injuries. Considering the medical evidence, it is apparent that the deceased died a homicidal death. It may be added here that this fact was not seriously disputed before the trial court as well as before this court. Therefore, it has to be held that the trial court was justified in observing that the deceased died a homicidal death.

12. Then we have to decide as to whether the trial court was justified in holding that the said injuries were actually caused by the present appellants. As said above, the informant has stated in FIR Exh. 38 as well as in his oral evidence that the informant as well as the

deceased both were dealing with business of sale and purchase of groundnut in partnership and they used to transport groundnut in the vehicle of witness Naran Rana. It is also the evidence of the informant that in the past they used to transport their goods in the vehicle of the first appellant. Now at this stage, it has been argued on behalf of the appellant that the first appellant did not have any vehicle and, therefore, there could not be any transport of goods of the informant and the deceased in the truck of the first appellant. Now the truck may not be belonging to the first appellant or other appellants. It seems that the deceased as well as the informant used to transport their goods through the first appellant. In other words, the first appellant may be working as commission agent or he may be making arrangement for the transport of the goods of the informant as well as of the deceased from one place to another. The witnesses have consistently stated that the first appellant used to transport goods of the informant as well as of the deceased before about 5 years. They have also said that for the said purpose, the first appellant used to come to the house of the informant. When the first appellant was at business terms with the informant and the deceased, it would be quite natural that they would visit the residence of the informant for the purpose of discussion. Therefore, it is quite natural that the informant and the deceased knew the first appellant since long. It has also been stated in the FIR that since last about 5 years they used to transport their goods in the truck of prosecution witness Naran Rana. This would show that the goods of the informant and the deceased was not being transported in the truck of the first appellant or through his agency since last five years. It can be gathered from the said event that the first appellant was therefore, angry and annoyed on account of the aforesaid conduct of the informant and the deceased and, therefore, he met the informant on the date of the incident at about 7 p.m. near Majevadi gate at Junagadh and enquired from him as to why the goods were not being transported in the truck of the first appellant. It means that the first appellant insisted that the informant should transport his goods in the truck of the first appellant then the informant should pay R.200/- per trip to the first appellant. This appears to be a threatening proposal made by the first appellant to the informant. The informant replied that he could not pay the said amount and ultimately there was a meeting at 10 p.m. at the residence of the informant with the deceased. The deceased, according to the FIR, was also not agreeable with the said threatening proposal and, therefore, he

proposed to persuade the first appellant and, therefore, all of them had gone to the house of the first appellant which is situated outside Majevadi gate. Undisputedly the first appellant has been staying there outside the said gate. These facts have not been seriously disputed during the cross examination of the informant also. The aforesaid facts are further supported by ocular evidence of the informant. Therefore, oral evidence of the informant on this aspect has been amply supported by the FIR which has been registered within two hours of the happening of the incident. This shows that the FIR was lodged without any loss of time and it, therefore, cannot be said that the prosecution has concocted the same story with a view to falsely implicate the appellants in the offence in question.

13. The said fact is further supported by the conduct of the first appellant. The first appellant in the company of other appellants went to the house of the informant where the incident in question took place. This shows that the first appellant knew the address and whereabouts of the informant. This again shows that the first appellant was on visiting terms with the informant. There also they enquired as to why the deceased and the informant did not transport their goods in the truck of the first appellant. At that point of time, the appellants dealt blows with iron pipes, sword and stick on the informant, deceased and Naran Rana and all of them sustained injuries at the hands of the appellants as per the case made out in the FIR.

14. The aforesaid facts are further supported by the evidence of the informant which has been recorded before the trial court at Exh.37. There also the said fact has been reiterated by the informant in details. The aforesaid facts are further supported by the evidence of other eyewitnesses. We can find the evidence of Naughan PW 5 Exh 39. The deceased was the sister's husband of this witness. This witness has stated that at the time of the incident, he was staying at Surat. He had come to the place of the deceased for attending certain marriage. He has also stated that at about 10 a.m. on the date of the incident he was present at the residence of the informant. That the informant and the witness-Naran Rana were also present there. That at that time, the informant disclosed that the first appellant had met him near Majevdi gate and inquired as to why his truck was not utilised for carrying the goods of the deceased and the informant. That the first appellant also told him that if they did not use the truck of the first appellant, they would be required pay to the first

appellant a sum of Rs.200/- per trip. That at that time, the deceased told the informant that money could not be paid in that way and, therefore, the informant and the deceased with others went to the residence of the first appellant but he was not available and, therefore, they all returned to the residence of the informant. That they were right on the road, lights were on and they were exchanging some talks. In the meantime, the appellants arrived there in a rickshaw and again enquired as to why they were not transporting their goods in his truck. At that point of time, before the deceased could give reply, the first appellant dealt pipe blow on the head of the deceased. Appellant Jadav dealt pipe blow on the head of the witness. Appellant-Raja Lakha dealt a blow with sword on the back of the informant. Appellant Jika Devayat dealt a stick blow on the hand of Naran Rana. That thereafter they started running away towards the rickshaw and ultimately they ran away in the said rickshaw. According to the witness, thereafter the injured were taken to the Government Hospital and after primary treatment at Civil Hospital at Junagadh, the informant and the deceased were treated at Civil Hospital, Rajkot where the deceased died in the early morning. The witness has also identified all the appellants.

15. Even this witness has also deposed that he used to go to Junagadh at some intervals. That he had seen the appellants and therefore he was in a position to identify the appellants. The appellants tried to show that the witness was a stranger, that he was staying at Surat and therefore, he was unable to identify the appellants. These questions have been properly replied by the witness during the cross examination. Therefore, the question of mistaken identity does not arise so far this witness is concerned. Again this witness is an injured eyewitness. He was immediately treated at Civil Hospital, Junagadh and he was also treated at Civil Hospital, Rajkot. Looking to the immediate conduct of the witness, it has to be accepted that the witness was present at the time when the crime was committed and he was in a position to identify the appellants. When the appellants were known to the witness as well to the informant, then the question of mistaken identify would not arise and even if there was no test of identification parade, it would not be an obstacle in the way of the prosecution. When the accused persons were known to the witnesses i.e. the eye-witnesses, absence of test identification parade would not be fatal to the case of the prosecution. It is also required to be considered that the witness was able to name at least three accused

persons. When the names of the appellants have been given by the witness, it would go to show that the witness knew the appellants even before the date of commission of the offence. Here we may keep in mind that the witness has not been confronted with his police statement and therefore, it has to be accepted that the witness had disclosed the names of these appellants during the course of his police statement also. This clearly indicates that the witness know the appellants even by names since before the date of the offence. Therefore, it was not necessary for the Investigating Officer to arrange for test identification parade.

16. Then there is the evidence of PW 6, Nilkanth Bhovanbhai at Exh.40. He is the son of the informant and the incident had taken place right in front of his residence where he was staying with his father and therefore, he was a natural eye witness.The incident took place at about 10.30 p.m. the time at which the members of the family would ordinarily be at house. This witness has deposed before the trial court that the incident took place at about 10.30 am. That on that day, the deceased and Naran Rana had come to his residence. The aforesaid talks about stoppage of vehicle by the first appellant was again reiterated by the witness. Then he further says that the deceased, the informant, Naughan and Naran Rana all had gone see the first appellant and they returned within 30 minutes. That thereafter, they were standing on the road, lights were on. At that time the appellants arrived there in a rickshaw and started quarreling with the deceased and the informant. Thereafter, according to the evidence of this witness, the appellants dealt blows with iron pipes, sword and stick on different parts of the body of the deceased, informant and Naran Rana. Even Naran Rana tried to intervene and he also sustained injury at the hands of appellant Jika Devayat. The witness says that he knew the appellants and he was able to identify them also.
For the reasons stated hereinabove, it has to be accepted that the witness knew the appellants even before the date of the incident. Therefore, even with respect to this witness, it was not necessary for the Investigating Officer to make an arrangement for test identification parade. The witness has also clarified that at the time of the incident, the groundnuts were being transported in the truck of witness Naran Rana but in the past, the informant used to transport groundnuts in the truck of appellant Bhupat Rabari and Jadav Devayat. He has further stated that appellant-Bhupat Rabari and Jadav Devayat used to come to his residence very often and, therefore, he knew them. It is further stated by him

that appellant No.3, Jika Devayat and Naran Rana used to accompany Bhupat Rabari and therefore, he knew them also.

17. During the course of lengthy cross examination, the aforesaid aspects of the evidence of the said witnesses could not be shaken to any extent. In fact, all these witnesses have been cross examined at length. Yet, evidence has not been shaken to any extent. In that view of the matter, it is not possible for this court to reject the testimonies of these witnesses on the ground of mistaken identity. The question of mistaken identity would not come into play when the witnesses knew the appellants even before the date of the incident. It is more so, when they were on business terms and when the details have been given by all these witnesses as to how they knew the appellants. It is required to be considered that so far as the earlier transactions between the appellant and the informant are concerned, all the witnesses have consistently said that before about 5 years, the goods of the informant and the deceased was being transported in the truck of the first appellant. This evidence has not been seriously challenged during the course of the cross examination of the witnesses. In that view of the matter, when the deceased and the informant were on business terms with the appellants, five years before the date of the incident, it has to be accepted that the deceased, the informant and other witnesses knew the appellants very well and very closely. It is a matter of record that there were lights on the road and even the lights of the truck were also on. Therefore, there was sufficient light on the road at the time of the incident and, therefore, the witnesses had all opportunities to identify the appellants on the road.

18. Moreover, the previous incident had taken place just three hours before the incident in question. At that time, the first appellant was responsible for the said incident. Therefore, looking to the chronology of events, it has to be accepted that the witnesses were in a position to identify the appellants at the time when the offence was committed. It is also required to be considered that even in FIR, though the informant has stated the name of the first appellant as Bhupat Kala, at other places, his name has been shown only Bhupat without mentioning the name of the father of the appellant. It is true that the first appellant is Bhupat Devayat Rabari and not Bhupat Kala. It is also required to be considered here that in all, seven accused persons were tried before the trial court and the charge sheet was also filed against those seven persons. Charge Exh.1

also shows that the said charge was framed against all the seven accused persons. Out of them, accused No.6 and 7 have been acquitted by the trial court. From the list of the said seven accused, we can gather that accused No.6, was Kala Pancha Rabari and accused No.7 was Kara Jiva Rabari. Therefore, there was at least one accused person having name of Kala Pancha and one accused having name of Kara Jiva. It may be that while naming those accused persons Kala Pancha and Kara Jiva, the informant may have referred them as Bhupat Kala and instead of naming them as separate accused persons, name of Kala has been shown just next to Rabari Bhupat indicating that it was name of one accused person as Bhupat Kala, though the informant may be wanting to show them as separate accused persons i.e. Bhupat and Kala. Instead of writing Bhupat and Kala or Bhupat and Kara, it may have been written in FIR, Bhupat Kala or Bhupat Kara. This probability cannot be ruled out when the FIR was lodged by an injured eye witness, having sustained serious injury and particularly when it has been lodged within two hours of the incident.

19. Therefore, the point of mistaken identity cannot be successfully pleaded by the defence even before this court. So we find from the record that at least three witness Bhovanbhai Harjibhai, PW 4 Exh.37, Naughanbhai Ebhabhai, PW 5 Exh.39 and Nilkant Bhovanbhai, PW 6, Exh.40 all have consistently given the names of the present appellants as the assailants. It is required to be considered that though Bhupat has been shown as Bhupat Kala in the FIR and though he is really Bhupat Devayat. it is required to be considered that so far as the other accused persons are concerned, there is no question of mistaken identity as they never named appellant Bhupat as Bhupat Kala or Bhupat Kara at any point of time. It is required to be considered that appellants-Bhupat, Jika and Jadav are all real brothers. Therefore also there are reasons to believe that appellant Bhupat was actually accompanied by his two brothers Jika and Jadav. This should also show that appellant-Bhupat was present at the spot when the incident took place and Bhupat who has been named in the FIR by the informant is really Bhupat Devayat and not Bhupat Kala. Therefore, there was no necessity for the I.O. to investigate if there was any person having name Bhupat Kala.

20. Then, there is evidence of last eye witness Naran Rana, who has not supported the case of the prosecution. The said witness has been examined before the trial court as PW 20 at Exh.68. According to the case of prosecution, Naran Rana-Exh.68 was a driver in whose truck the goods of the informant and the deceased was

being carried from one place to another since last about five years. According to the prosecution he was also present when the first episode took place near Majevdi gate. He was also present when the second incident, which is really an incident of murder, which has taken place near the house of the informant. Therefore, according to the case of the prosecution, he was an eye witness and yet he has not supported the case of prosecution and, therefore, he has been treated as hostile witness by the prosecution. It is well settled that when this eye witness has been treated hostile, the prosecution can successfully argue to ignore his evidence which might not support the case of the prosecution. At the same time, it is also well settled that the evidence of the hostile witness is not required to be rejected outright. A part of the evidence of such a hostile witness which gets corroborated from other materials, can be acted upon by the Court also, It would, therefore, be relevant to consider his evidence. If his evidence is looked at closely, following events emerge from his evidence:

(i) He was having a truck in which the goods of the informant and deceased was being carried from different places to Junagadh and it was being sold at Junagadh.

(ii) On the date of the incident, the truck loaded with groundnut was emptied in Amar Industries at Junagadh which is situated in GIDC estate outside Majevdi gate at Junagadh.

(iii) Thereafter at evening hours, he and the informant both were proceeding towards their residence.

(iv) When they were passing by Majevdi gate, two persons halted the truck and one of them had some exchange of words with the informant, insisting that his truck should be utilised.

(v) On the said date at about 10 p.m. he had gone to the residence of the informant for collecting transport charges. At that time, the deceased, his brother-in-law and one another person were present there.

(vi) There was a discussion that one person was required to be persuaded.

(vii) They all proceeded to a place near Majevdi gate and returned and thereafter he left the place (of

offence) and hardly be covered a distance of 50-200 feet, at that time he heard shouts and when he looked back he noticed that there was some exchange of blows, but he did not go back to the said spot.

(viii) Thereafter he went to the hospital and noticed that deceased, informant and Naughanbhai were present there. He was told by Naughanbhai that condition of the deceased was serious. Thereafter he went to contact the relatives and returned to hospital at Junagadh. That the injured were not present in the hospital at Junagadh and, therefore, he had gone to Rajkot and returned to Junagadh on the next day.

(ix) He did not remember if the persons who halted the vehicle near Majevdi gate were really the appellants.

(x) He had not received any injury in the incident in question, but he had fallen on road and, therefore, he had sustained injuries.

(xi) That he has been transporting groundnut, of the informant and the deceased since last five years in his truck.

20. This shows that so far as the first incident near Majevdi gate is concerned, he has virtually supported the case of the prosecution without naming the appellants. Then the talk took place at the residence of the informant has also been reiterated by him without naming the appellants. Then he has also supported the case of the prosecution that all of them had gone to a house near Majevdi gate. There also he omitted to name the appellants. Then again, with respect to the last episode near the house of the informant also, he supported the case of the prosecution without naming the appellants. Therefore, he has substantially supported the case of the prosecution without naming the appellants. This aspect of his evidence cannot be overlooked. This shows that there was some incident at Majevdi gate and the last incident took place near the house of the informant and to that extent even this hostile witness corroborates the cases of the prosecution.

21. It is, therefore, clear that the informant and other witnesses had all opportunities to have a closed look at the appellants and the appellants were known to

the witnesses before the date of the incident. At least with respect to the informant, the appellants had previous business dealing before about five years. Even other witnesses also explained as to how they could identify the appellants. The evidence of the witnesses with respect to the previous transactions about transporting of groundnut of the deceased and informant by the first appellant has not been seriously challenged during the cross examination of the witnesses. Once it is found that the appellants and the informant had previous business dealings, five years before the incident and when other witnesses have said that they had opportunities to see the said appellants about 5 years before the date of the incident, then it cannot be said that the appellants could not be identified by the witnesses and they were falsely implicated in the case. So far as the false implication is concerned, the informant and other witnesses had absolutely no reason to falsely implicate the present appellants in the present case which is a serious one relating to an offence punishable with death or with imprisonment for life. So far as the witnesses are concerned, there is no enmity with the appellants. On the other hand, the appellants did possess some enmity and grudge against the informant and the deceased inasmuch as, they had suffered loss on account of the fact that the informant and the deceased had changed the transporter. Instead of hiring the vehicle of the appellants, they they started hiring the vehicle of Naran Rana. It is true that Naran Rana has not supported the case of the prosecution to the extent of involving the appellants. However, it seems that they belong to the same caste and at the same time they belong to the same business class also. When the appellants have shown such high-handedness, then even out of fear, Naran Rana may not have chosen it to be proper to support the case of prosecution. However, apart from naming the appellants as the assailants, rest of the part of his evidence clearly supports the case of the prosecution.

22. On the issue of mistaken identity of an accused person, learned Advocate for the appellants has relied upon two decisions. First one is in the case of Gopal Singh v State of M.P., reported in 1972 Cri.L.J.1045 equivalent to AIR 1972 SC 1557. This judgment has been rendered by Hon'ble the Supreme Court. It would be relevant to refer to the observations of the Apex Court in para 8 of the said judgment as follows:

"But even if we assume that the High Court was right in concluding that the dying declaration

> established the identity of the appellants, it was certainly not of that character as would warrant its acceptance without corroboration. It is settled that a court is entitled to convict on the sole basis of a dying declaration if it is such that in the circumstances of the case it can be regarded as truthful. On the other hand, if on account of an infirmity, it cannot be held to be entirely reliable, corroboration would be required. (AIR 1958 SC 22). In this case, it must be first remembered that though the names of the appellants' fathers were known to Modsingh and others who accompanied him to the police station, their fathers' names and present residence have not been mentioned. It is rather unusual for police officers not to enquire and record in the first information the full name and address of the persons complained against. Secondly, the assault had taken place in a jungle on a dark night which may cause mistaken identity. Thirdly, neither Modsingh nor any of his relations had given any cause to the appellants, personally, to plan and execute a murderous attack on him. Fourthly, there were other persons bearing the appellants' names in the same village and admittedly they were on inimical terms with the deceased. Fifthly, the deceased had named Hatesingh also as one of the assailants although it has now turned out in the evidence of Umrao das, PW 1 that the deceased and Hatesingh had cordial relations with each other. In these circumstances, sufficient corroboration would be required for acting on the dying declaration."

On going through the said observations, it is clear that the accused were on inimical terms with the deceased and they could identify some accused and they were convicted and the conviction was upheld. However, with respect to the other accused persons, reasons have been given to show that the witnesses were not in a position to identify the concerned accused persons. The assault had taken place in a jungle on a dark night which may cause mistaken identity. Then neither Modsingh nor any of his relations had given any cause to the appellants, personally, to plan and execute a murderous attack on him. Full name of the accused appellants were not given in the FIR and no further enquiry was made by the police officer with respect thereto. The deceased had given the name of Hatesingh as one of the appellants. However, it

was brought out in evidence that Hatesingh had cordial relations with each other. Considering the aforesaid circumstances, it was observed that witnesses were not found to be reliable with respect to the identity of the accused persons. The observation of the Hon'ble Supreme Court was that the aforesaid aspects were not properly weighed by the High Court which had reversed the acquittal recorded by the trial court. Therefore, it is a matter in which the Sessions Court had acquitted the accused persons and acquittal was reversed by the High Court and this aspect was considered by the Hon'ble Supreme Court by reversing the conviction recorded by the High Court.

23. Another decision is in the case of Karnail Singh v. State of Punjab, reported in IR 1995 SC 1972. In that case, there was some error in describing one of the accused by not properly mentioning name of his father. His participation was held to be doubtful and benefit of doubt was given to him by the High Court. Therefore, it was not interfered with at the level of Hon'ble Supreme Court. It is required to be considered that this was a matter challenging the acquittal recorded by the trial court. There, the witness was found to be from a different village and, therefore, it was found to be difficult to accept the case of the prosecution that the witnesses could identify the accused person. In the present case, we find that the facts are different. The witnesses belong to the same place. They were on business terms about five years before the date of the incident. The evidence on record shows that the appellants were on visiting terms with the informant and therefore, the witnesses had all opportunities to identify the appellants. Lights were on at the place of incident and lights of the truck were also on at that point of time. Therefore, the witnesses had sufficient opportunity to look at and identify the appellants. Except the aforesaid alleged mistake in referring the name of the father of the first appellant at a couple of places in the FIR, at rest of the places, the first appellant has been shown by his name. The FIR has been filed without loss of time and even the statements of witnesses were recorded without any loss of time and yet the witnesses have consistently given the version that they were knowing the appellants and the appellants had committed the offence in question. Therefore, the evidence is quite consistent and natural. Therefore, the presence of the witnesses and of the appellants is also found to be natural. Even the hostile witness also supported the case of the prosecution to a significant

extent. Previous enmity was also brought on record, previous transaction has not been challenged during the lengthy cross examination. Therefore, on the one hand, the witnesses knew the appellants in advance and they were on visiting terms and on the other it was also a matter on record that except at a couple of places, name of the first appellant has been shown as Bhupat only. The reasons for showing the name as Bhupat Kala has been discussed hereinabove also. Therefore, when the appellants were known to the witnesses since long, there is no question of mistaken identity. The trial court has considered this aspect in appropriate manner. Therefore, we also fixed that the trial court has not committed any error in holding that it was not a case of mistaken identity.

24. On the other hand, learned APP has also shown a recent decision of the Supreme Court in case of Ramanbhai Naranbhai Patel v. State of Gujarat, reported in (2000) 1 SCC 358. There the matter related to identification of the accused person in the court in absence of any test identification parade. It is ordinarily argued that the identification of the accused person, for the first time in the court by eye-witnesses when they did not know the accused earlier, it would not carry any evidentiary value without any test identification parade held at the stage of investigation. However, in the aforesaid decision, the Supreme Court has observed that such evidence may be treated to be weak in nature but it is not totally irrelevant or inadmissible. There it was found that the two eyewitnesses themselves were assaulted and seriously injured in broad day light. Therefore, they could have easily seen the faces of the assailants and their identify would well remain imprinted in their minds. Moreover, since the third witness had seen the fatal assault on her husband causing fatal injuries to him, faces of the accused can easily be treated to have been imprinted in her mind. Therefore, he Supreme Court observes that "even in absence of a test identification parade none of the three witnesses could be said to be interested in robbing in innocent persons by shielding the real assailants." In the present case, the important aspect is that the appellants were already known to the witnesses since before the offence and the said fact has not been seriously disputed even during the cross examination also. Some attempts were made to bring some factual aspects during the cross examination of the P.I. Mr Chudasama. It seems that some facts had come to the notice of the said officer during the course of the investigation. However, when a particular fact comes to

the notice of the Investigating Officer through the statements recorded by him, the statements of witnesses recorded under section 161 of the Code are not admissible in evidence. They can be used for the purpose of contradiction. In the present case, we find that some factual aspects have been brought on record during the cross examination of Mr Chudasama by the learned Advocate for the defence in the trial court. This means that some factual aspects from the statements of witnesses recorded under section 161 of the said Code have been indirectly brought on record through cross examination by the I.O. This is totally impermissible as laid down in the case of Hamidulla v. State of Gujarat, reported in 1988 Cr.L.J. 981 (Guj.). Any way, even the said portion of the said evidence of the Investigating Officer does not help the defence to any extent. By and large the defence has relied upon the the evidence of the prosecution witnesses, in order to argue that it is a case of mistaken identity and, therefore, evidence of the witnesses could not have been accepted by the trial court on the point of identity of the appellants. In view of the aforesaid facts and circumstances, we find that looking to the past dealings between the witnesses and the appellants and looking to their past acquaintance, we are unable to accept the arguments of the learned Advocate for the appellants that the witnesses were not in a position to identify the appellants and, therefore, it is a case of mistaken identity.

25. It was also argued before us that the witnesses have not given full names of the appellants. In other words, it has been argued that names of the appellants' father were not disclosed by the prosecution witnesses. Now when the witnesses and the appellants were on business terms, the witnesses might not have any occasion to know the names of the appellants' father also. However, when the fact that they were on business terms even 5 years before the date of incident was not at all in dispute and when the said fact has not been challenged during the lengthy cross examination, it has to be accepted that they were on business terms and, therefore, even when the names of the father of the appellants were not disclosed by the witnesses, it would not be fatal to the case of the prosecution. We are, therefore, not in a position to accept the case of mistaken identity. In other words, the witnesses have clearly identified the appellants being present at the time when the incident took place.

26. Then it is a matter of record that all the appellants have participated in hitting and beating. The incident has taken place right in front of the house of the informant. The deceased was killed by inflicting blows on his head. According to the evidence of the Medical Officer, the injuries were fatal and they were sufficient in the ordinary course of nature to cause death of the deceased. It is a matter of record that the deceased died in the hospital on next morning on account of the injuries sustained on his head. This clearly shows that the appellants had formed a group having a common intention of killing the deceased. So far as the informant is concerned, he sustained grievous hurt and he was required to be shifted to Rajkot. If we go through the evidence, it can be seen that the injuries caused to him were serious. This can be gathered from the evidence of Dr. Karia at Exh.24, who is running a surgical hospital at Rajkot. The injured was taken to the said hospital and he was treated by the said Doctor. It would be relevant to consider his injuries. The fact with regard to injuries sustained by the informant which has been described by the witness stand corroborated by his medical certificate at Exh.25. We can notice the following injuries from the said certificate at Exh.25:

"A. On examination patient's general condition was extremely poor, Pulse: 110 per minute, Blood Pressured: 90 systalic, Temperature: Normal, and respiratory rate 28 per minute. Chest was clear, air entry: good.

B. Sutured wound: 2" size just below 12th rib in the left loin. Small abrasion 1/2" size in the left loin.

C. Anteriorly abdomen was distended. Tender all over. Free fluid present in abdomen. Bowel sounds: absent. In dwelling cathoor was put in which drained 500 c.c. blood stained urine.

D. Emergency I.V.P revealed normal functioning both kidneys with suspected porirenal haematoma. After thorough investigations, emergency laparotomy was done.

E. - Massive intra peritoneal haemorrhage was found (Peritoneal cavity full of blood)
- Tear in the large bowel mesentry at splenic flexure
- Liver spleen : Normal

- Small and large intestines were normal
- Big retro-peritoneal haematoma extending upto duodeno Jejunal flexure
- Duodeno-Jejunal flexure codomatous with haematoma
- Left kidney sliced into 2 half at the centre with massive bleeding."

27. It appears from the evidence of this Doctor that the injury sustained by this witness was grievous and his condition was also serious. He was required to be operated. Looking to the nature of injuries and looking to the nature of part of the body selected for injury and looking to the weapon used and looking to the serious condition of the injured, it is clear that the appellants intended to cause murder of this witness also. In other words, the appellants had a common intention of causing murder of this person also and in furtherance thereof, they caused this injury to this witness. All the appellants would, therefore, be equally guilty for committing offences under section 307 and 302 read with section 34 of IPC. Even Dr. Vasavada at Exh.26 had also examined and treated the informant. His evidence also shows that the intestine of the witness was stuck with one another and he was required to be operated and he was actually operated and was discharged from Hospital on 1.7.1993. This means that the witness remained as indoor patient in his hospital for more than one month. This also shows that the condition of this witness was serious. In that view of the matter, the trial court was justified in convicting the concerned appellants even for the offence punishable under section 307 of IPC. It is true that the panchas, by and large, have not supported the case of the prosecution.

28. It also appears that at least three witnesses did not attend the court in response to the service of summons and they were required to be brought to the court by issuing non-bailable warrant. This shows the conduct of the witnesses in attending the call of the court. At the same time, it is also a matter of record that the investigating agency does not appear to have sent the blood to the serologist for identifying the blood group. There cannot be any dispute about the same. At the same time, it is also required to be considered that such evidence would come on record as corroborative piece of evidence. However, it is found from the substantive evidence of the eyewitnesses that their evidence is reliable. Their evidence inspire confidence and when the

eyewitnesses are found to be reliable and trustworthy and when that is the substantive evidence, then in that event, mere absence of corroborative piece of evidence would not be a factor in favour of the defence. So on the one hand, the prosecution has established the case of motive, then, the eyewitnesses have given direct evidence to show involvement of the appellants in committing the offences in question. Then their evidence is supported by medical evidence and conduct of the appellants also. Having regard to the facts and circumstances and the evidence on record and considering the observations of the trial court for accepting the evidence of the aforesaid witnesses, we are of the view that it is not possible to take a view different from the view recorded by the trial court for accepting the evidence of the witnesses and for holding the appellants guilty for the offences. We find that the trial court has committed no error in appreciation of evidence on records. By and large, we are in agreement with the reasonings and findings of the trial court. In that view of the matter, we find no merit in the present appeal and consequently the appeal deserves to be dismissed.

29. For the foregoing reasons, this appeal is ordered to be dismissed. The judgment and conviction order passed by the trial court are confirmed.

5.6.2003 [K R Vyas, J.]
msp

[D P Buch, J.]